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Supreme Court of the United States

OCTOBER TERM, 1945. No. 328

IN THE MATTER

of

SPIER AIRCRAFT CORPORATION,
Bankrupt,

SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Appellant.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

Summary Statement of Matter Involved 1

Reasons Relied Upon for Allowance of the Writ . 4

Appendix "A"—Constitutional Provisions and Federal Statutes Involved 8

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI:

I. Opinion Below 11

II. Jurisdiction 11

III. Statement of the Case 12

Appendix "B"—Questions Presented 12

Point I. The legal liability for taxes is measured by the interest in the property taxed. A tax beyond that is confiscatory and unconstitutional 13

Point II. The increased tax claim was a result of caprice, hearsay, without notice or hearing, and has no legal foundation 20

CONCLUSION 22

Cases Cited.

PAGE

Arkansas v. *Thompson*, 313 U. S. 132, 61 Sup. Ct. 888, 85 L. Ed. 1244 20

Curry v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900 15

General Motors Acceptance Corporation v. *Hayes Motor Co., et al.*, 12 N. J. Misc. 384, 172 Atl. 343.. 15

General Motors Acceptance Corporation v. *Whitfield* (1934), 62 S. Dak. 415, 253 N. W. 450 ..... 16, 18

In re D. O. Summers Co., 45 A. B. R. (N. S.) 123 .. 5, 14

In re Wells, 23 A. B. R. (N. S.) 615, 4 Fed. Supp. 329 19

In re Wingert v. *Hartle*, 22 A. B. R. (N. S.) 113, 62 Fed. (2d) 418 ..... 6, 14

Lambertville Rubber Co. Inc., 42 A. B. R. (N. S.) 697, 111 Fed. (2d) 45 20

Little v. *Wells*, 13 A. B. R. (N. S.) 370, 29 Fed. (2d) 1003 ..... 6, 14

Murray v. *McLeish Co.*, 10 A. B. R. (N. S.) 307 .... 5, 14

New Jersey v. *Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284 21

Noyes v. *Finneran*, 12 N. J. L. 216 16

Robertson v. *Goree*, 13 A. B. R. (N. S.) 64, 29 Fed. (2d) 261 ..... 5, 14

Torrington Co. v. *Sidway-Topliff Co.*, 70 Fed. (2d) 949 ..... 5, 6, 14

Township of Hillsborough v. *Doris Duke Cromwell*, decided January 28, 1946, Vol. 90—No. 7, Sup. Ct. L. Ed. Ad. Sh. 298 ..... 6, 21

PAGE

UNITED STATES CONSTITUTION.

Fifth Amendment 6, 8

FEDERAL STATUTES.

Sec. 64A (4) (U. S. C. A. Title 11, Chap. 7, Sec. 104) 9
Sec. 240A U. S. J. C. as amended by Act of February 13, 1925, 28 U. S. C. A. Sec. 347A 11

NEW JERSEY STATUTES.

P. L. 1933, Ch. 157 15
R. S. 54:4-1 8
R. S. 54:4-14 8

OTHER AUTHORITIES.

Bogert, Commentaries on Conditional Sales, Vol. 2A (1924), Sec. 28, p. 37 18
Bristow, Some Problems Arising Out of Tax Claims in Bankruptcy (1940) 14 Journal of National Association of Referees, 90 ..... 6, 14
Collier, Vol. 3, p. 2137 (14th Edition) 13

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of

SPIER AIRCRAFT CORPORATION,
Bankrupt,

SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Italics ours, unless otherwise noted.)

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Summary Statement of Matter Involved.

1. Petitioner challenges the correctness of a decision by the United States Circuit Court of Appeals for the Third Circuit which affirmed an order (Tr. p. 77) of the United States District Court for the District of New Jersey upholding a claim filed by the City of Jersey City against the estate of the Spier Aircraft Corporation, bankrupt, for per-

sonal property taxes in the sum of $11,803.04. The opinion of the District Judge is at pages 75-76 of the Transcript. The Referee's memorandum opinion is at pages 65-68 of the Transcript. The United States Circuit Court of Appeals affirmed the District Court without opinion.

2. On January 22, 1943 a petition in involuntary bankruptcy was filed against Spier Aircraft Corporation in the United States District Court for the District of New Jersey. Adjudication followed on February 9, 1943. On February 10, 1943 the Collector of Taxes of the City of Jersey City filed a claim (Tr. pp. 2-4) with the Referee in Bankruptcy claiming unpaid personal taxes due from the bankrupt in the sum of $3,024.96. On September 8, 1943 the Collector of Taxes of the City of Jersey City filed with the Referee a document denominated "Supplemental Proof of Claim" (Tr. pp. 5-7) in which taxes for the year 1943 were claimed to be due from the bankrupt in the sum of $11,803.04 instead of $3,024.96 as was originally claimed. Nothing appears in the supplemental proof of claim which indicates the basis for the increased amount thereof. The record is barren of any proof as to what rights in tangibles entered into the determination of the Tax Collector.

3. Petitioner objected to the increased claim. The increase in the assessment was due to a revaluation of the bankrupt's property by the Hudson County Board of Taxation, without notice to petitioner or the Referee in Bankruptcy (Tr. pp. 34-36). It was purely an administrative act and not the result of a due hearing, nor the act of a quasi-judicial agency (Tr. p. 30). At the time of the filing of the supplemental proof of claim the time for appeal from the increased assessment made by the Hudson County Board of

Taxation had expired (Tr. p. 34). By reason thereof petitioner was deprived of the right of appeal from such increased assessment or revaluation.

4. The revaluation of the property was attributable to the fact that in the course of the proceedings in bankruptcy a bid for the assets of the bankrupt in the sum of $165,000.00, free and clear of all liens, had been made (Tr. 30). This bid was never accepted, the property involved having been requisitioned by the United States Government through the Navy Department, which tendered $133,850.56 in payment, which offer petitioner rejected. The United States Court of Claims has fixed $165,000.00 as the amount of just compensation. The time for review of the latter determination of the United States Court of Claims has not yet expired, and whether certiorari will be sought cannot now be stated. The Referee in Bankruptcy found (Tr. 67, Appendix 6A), that in bankruptcy the assets of the corporation were subject to conditional sales contracts and a chattel mortgage aggregating $82,041.72.

5. Petitioner contended below that the increased tax was confiscatory and discriminatory, and that the Hudson County Board of Taxation of the City of Jersey acted beyond its legal powers; that his constitutional rights were denied him because the time to appeal from such assessment had expired prior to the filing of the supplemental proof of claim or notice of the existence thereof; that the creditors of the bankrupt estate are entitled to the benefit of a reduction in the tax assessment to the extent of the unpaid balances due on the conditional sales contracts existing against the property upon which the assessment was

made, inasmuch as the bankrupt corporation had merely special title in such property to the extent of payments made on account thereof, the general property therein remaining in the conditional vendors; that at best the extent of the tax imposed upon the estate should have been calculated and fixed on the amount that Spier Aircraft Corporation paid on account of the contract price, for otherwise the general creditors of the estate of the bankrupt would be paying taxes upon property which did not belong to the bankrupt, but in which the bankrupt had only a partial interest.

6. Petitioner contends that the determination by the United States Circuit Court of Appeals for the Third Circuit was erroneous and violative of his constitutional rights and the rights of general creditors, and in direct conflict with the decisions of the Courts of the various circuits, all of which are more particularly hereinafter set forth.

7. This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit, and the questions presented for determination upon this petition are set forth in Appendix B (p. 12) hereunto annexed.

Reasons Relied Upon for Allowance of the Writ.

1. This case presents questions of constitutional law arising out of the determination in the Courts below, and which in the first instance found its basis primarily in expediency rather than in legal foundation. Consideration and determination of these questions by this Court is necessary for the future guidance of the various Federal Courts throughout the land.

2. The determination by the Court below was in disregard of the rights of petitioner as trustee in bankruptcy, and of the rights of the general creditors of Spier Aircraft Corporation, in that the effect of the decision of the Court below is to require the general creditors of the bankrupt to pay taxes upon property not owned by the bankrupt estate.

3. Petitioner contends that encumbered personal property located upon a bankrupt's premises is taxable only to the extent therein of the special property existing in favor of the bankrupt, the tax being calculable only on the value of such special property.

Petitioner's contention in this regard is strengthened by the concession of the City of Jersey City in its brief filed with the Court below, in which it states at page 13 thereof:

> "Tangible personal property, actually located in the taxing district of Jersey City, *legal title* to which is in the bankrupt, is taxable by said authority according to its true value, regardless of chattel mortgages or conditional sales."

4. It is respectfully submitted that the *legal* title to the property which was subject to the unpaid balances on the conditional sales contracts was not in the bankrupt, and was therefore not taxable as against the bankrupt estate. We contend that the determination by the United States Circuit Court of Appeals for the Third Circuit is erroneous and not in accord with the principles of applicable decisions, and is in apparent conflict with *In re D. O. Summers Co.* 45 A. B. R. (N. S.) 123; *Robertson* v. *Goree* (C. C. A. 5th Cir.), 13 A. B. R. (N. S.) 64, 29 Fed. (2d) 261; *Murray McLeish Co.* 10 A. B. R. (N. S.) 307; *Torrington Co.* v.

Sidway-Topliff Co. (C. C. A. 7th Cir.), 70 Fed. (2d) 949; *In re Wingert* v. *Hartle* (C. C. A. 4th Cir.), 22 A. B. R. (N. S.) 113; 62 Fed. (2d) 418; *Little* v. *Wells* (D. C. Idaho), 13 A. B. R. (N. S.) 370, 29 Fed. (2d) 1003; See *Bristow*, Some Problems Arising Out of Tax Claims in Bankruptcy (1940) 14 Journal of National Association of Referees, 90.

5. In sustaining the controverted claim, the Court below in effect approved the methods of the taxing authorities in effecting a revaluation and increased assessment. These methods, inferentially, were condemned by this Court in *Township of Hillsborough* v. *Doris Duke Cromwell*, decided January 28, 1946, Vol. 90—No. 7, Sup. Ct. L. Ed. Ad. Sh. 298.

6. The increased assessment was the result of arbitrary and capricious acts on the part of the taxing authority, the product of hearsay, without trial or hearing afforded to petitioner, all of which petitioner contends was in violation of fundamental rights of the creditors whom petitioner is in duty bound to protect.

7. The United States Circuit Court of Appeals for the Third Circuit has decided these important questions in a way untenable and in conflict with the greater weight of legal authority, and is in conflict with the Fifth Amendment to the Constitution of the United States. The decision has the effect of creating confusion as to the proper rule of law which should be applied.

8. In the interests of brevity (Rule 38, Paragraph 2), petitioner restricts further discussion on these points, but respectfully refers to and incorporates by this reference thereto all of the matters presented to the United States

Circuit Court of Appeals for the Third Circuit, in the transcript of the record on appeal, with the same force and effect as if herein set out at length.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be therein named, a transcript of the record and proceedings herein; and, that the decree of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court; and, your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MAX L. ROSENSTEIN,
Counsel.

APPENDIX "A".

Constitutional Provisions, Federal and State Statutes Involved.

1. That portion of the Fifth Amendment to the Constitution of the United States which provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law."

2. New Jersey Statutes Annotated, R. S. 54:4-1:

> "Property subject to tax; date of assessment:
> All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

3. New Jersey Statutes Annotated, R. S. 54:4-14:

> "After making the valuation of the personal property for which a person shall be assessed the asesssor may deduct therefrom all debts bona fide due and owing from such persons to creditors residing in the state, but no such deduction shall be made unless the debtor shall make claim therefor in writing under oath and therein set forth the debts

owing by him, when incurred, to whom owing and where the creditor resides, the total amount of personal property of the claimant, including debts owing to him from solvent debtors, and also that no part of the debt was incurred for the purpose of reducing the taxes of the claimant, and that the stated value of the personal property of the claimant includes not only that to which he holds title or possession, but also that to which any other person holds title or possession for the claimant, whether in trust or not. A claim on behalf of a corporation shall be subscribed and sworn to by the president or principal officer."

4. Sec. 64A (4) (U. S. C. A. Title 11, Chap. 7, Sec. 104):

"The debts to have priority, in advance of payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided that no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court."

Supreme Court of the United States

OCTOBER TERM, 1945. No. .

IN THE MATTER
of
SPIER AIRCRAFT CORPORATION,
Bankrupt,
SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The United States Circuit Court of Appeals for the Third Circuit rendered a *per curiam* opinion on May 1, 1946, and is reported in Fed. (2d) .

II.

Jurisdiction.

Jurisdiction in this Court is invoked under Section 240-A of United States Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A. Sec. 347-A.

III.

Statement of the Case.

The essential facts in the instant case are fully set forth in the accompanying petition for Writ of Certiorari, and in the interests of brevity are not further elaborated upon. All necessary points involved will be discussed in the argument to follow.

APPENDIX "B".

Questions Presented.

1. Whether personal property of a bankrupt, subject to conditional contracts of sale is taxable to the full extent of the face value of such property, without diminution *pro tanto* to the extent of the valid liens against the same.

2. Does the assessment, levy and attempt to collect a tax from the bankrupt estate, beyond the extent of the interest of the bankrupt in the taxed property, constitute an invasion of constitutional rights.

3. The proofs show indisputably that the increase in tax was predicated upon a re-valuation of personalty in the possession of the bankrupt, without a judicial trial or hearing, and the question is raised whether there has been a denial of substantial constitutional rights.

POINT I.

The legal liability for taxes is measured by the interest in the property taxed. A tax beyond that is confiscatory and unconstitutional.

In the instant case it was established that there were admitted liens against the personalty of the bankrupt amounting to $82,041.72, the legality of which were not questioned. It is contended by the City of Jersey City in Point III of its brief in the Court below that "tangible personal property actually located in the taxing district of Jersey City, *legal title to which is in the bankrupt,* is taxable by said authority according to its true value, regardless of chattel mortgages or conditional sales." This statement while untenable, and without legal support, nevertheless, contains a concession that the only property taxable is that, legal title to which, is in the bankrupt.

Spier Aircraft Corporation had only a special interest in the chattels covered by the conditional sales contracts which existed here. It did not have legal title thereto. The legal title was vested in the conditional vendors. The only interest which the bankrupt had in the chattels covered by the contracts did not extend beyond the payments made by the bankrupt on account of the contracts under discussion.

The author of *Collier's* 14th Edition, Vol. 3, at page 2137 discusses this subject and says:

> "Under the proviso as extended by the 1938 Act to include both real and personal property, a needed element has been supplied. Any personal property incumbered, as by a chattel mortgage, or depreciated

in value may be abandoned by the trustee; or in the alternative evaluated as to the extent of the bankrupt estate's interest, as by a sale, and taxes paid on the basis of such evaluation."

Citing *In re D. O. Summers Co.*, 45 A. B. R. (N. S.) 123.

"Thus the estate will have no interest in personal property set aside to the bankrupt as exempt. Problems of allocating a general personal property assessment among the items of personal property of the estate may give trouble in some states where personalty assessments are not always as sharply confined to particular possessions as are those on real estate. But the existence of a valid lien on either real or personal property is not affected by the operations of this proviso. Any tax payment from funds in the trustee's control will be limited to the value, if any, of the estate's interest in the property over and above the amount of the lien."

Citing *Robertson* v. *Goree* (C. C. A. 5th Cir.), 13 A. B. R. (N. S.) 64, 29 Fed. (2d) 261; *Murray McLeish Co.*, 10 A. B. R. (N. S.) 307; *Torrington Co.* v. *Sidway-Topliff Co.*, (C. C. A. 7th Cir.), 70 Fed. (2d) 949; *In re Wingert* v. *Hartle*, (C. C. A. 4th Cir.) 22 A. B. R. (N. S.) 113; 62 Fed. (2d) 418; *Little* v. *Wells* (D. C., Idaho), 13 A. B. R. (N. S.) 370, 29 Fed. (2d) 1003; See *Bristow*, Some Problems Arising Out of Tax Claims in Bankruptcy (1940) 14 Journal of National Association of Referees, 90.

The determination by the Court below requires the trustee to pay a tax upon property which did not belong to the bankrupt, thus depriving the bankrupt's creditors of moneys belonging to them. It conflicts with decisions of Courts of equal and subordinate jurisdiction, and is contrary to the greater weight of legal authority.

We respectfully submit that the Court below could no more lawfully direct the payment by the trustee of a tax upon property which the bankrupt did not own, than it could order the sale of property in the possession of the trustee, but which did not belong to the bankrupt.

This Court in *Curry* v. *McCanless,* 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, through late Mr. Justice Stone, defined what rights in tangibles are available for the purposes of taxation. It is implicit in the language of Mr. Justice Stone that jurisdiction to tax land or chattels is dependent upon the *ownership* and location of the property sought to be taxed. The principle which is deducible in that case, and applicable here, is that those chattels are taxable as against the *owner* who is enabled to enjoy the fruits of his *ownership.* Only the owner of the property located in a taxing district is the one liable to taxation. Inasmuch as taxes are designed for the protection of one *owning* property, and it being a fundamental and generally accepted rule that persons holding property under conditional sales contracts are not the owners of such property, but merely have a special interest therein, the attempt to levy a tax upon the entire value of the chattels, as against a conditional vendee who merely holds possession thereof is devoid of any legal attribute.

In *General Motors Acceptance Corporation* v. *Hayes Motor Co., et als.,* 12 N. J. Misc. 384, 172 Atl. 343, the plaintiff, holding by assignment a conditional sales contract, sued in replevin to recover possession of a motor vehicle covered by the contract. The vehicle had been seized by the Sheriff of Warren County, New Jersey for overloading, in violation of P. L. 1933, Ch. 157, which provided a penalty

therefor. In finding for the plaintiff, the Court said, at page 387, 172 Atl. 343:

> *"Under the Uniform Conditional Sale act, the conditional vendor or finance company is construed to be the owner of the vehicle, the conditional sale act specifically stating that a conditional sale is actually a bailment * * * It is undoubtedly true that General Motors Acceptance Corporation is the legal owner of the vehicle in view of its conditional sale contract."*

The defendant there, contended that replevin did not lie in case of distress for any tax, assessment or fine to be collected or levied in pursuance of any law in the State of New Jersey. The Court rejected this contention and said:

> "This section does not apply to the case of taking of goods of a person who is in nowise subject to the tax." *Noyes* v. *Finneran,* 12 N. J. L. 216.

In *General Motors Acceptance Corporation* v. *Whitfield* (1934), 62 S. Dak. 415, 253 N. W. 450, a statutory lien for delinquent personal property tax was held not to attach to the interest of a conditional vendee in an electric refrigerator, since title to the refrigerator remained in the seller, and hence the seller could recover a tax paid under protest to prevent the sale of the refrigerator.

Speaking for the Court, Campbell, *J.*, said in part:

> "* * * conditional sale * * * is not a case where complete title, property, and ownership pass to the vendee * * *"

* * * * * *

"Legal title never passes out of the vendor until performance of the contract."

* * * * * *

"Conceding that by virtue of Section 6759, R. C., 1919, all personal property owned by Bessler (the conditional vendee) on January 1, 1931, or thereafter acquired, was subject to a first lien in favor of the state for all delinquent personal property tax of Bessler, and conceding that on January 1, 1932 a lien likewise attached to personal property of Bessler for his delinquent personal property tax of 1931, nevertheless such lien could not attach to property rights which had always belonged to appellant (the conditional vendor) with which appellant never parted and which Bessler did not then and never had owned, although he might have a contract right to obtain them. Bessler did not have on January 1, 1932, or at any time prior to the attempted levy, legal title to or complete property rights in the Frigidaire in question. By virtue of the conditional sale contract he undoubtedly had rights with reference to said Frigidaire in the nature of property rights. See *Williston on Sales,* Section 326; Bogart Commentaries, *supra,* page 31. It may very well be true that Bessler could transfer or encumber his rights (such as they actually were) and that the same could be reached by his creditors, and if apt procedure was provided by statute could be applied to his taxes; but we do not think his rights were of such nature that they could be reached by distress or sale under the provisions of Section 6775, R. C. 1919."

* * * * * *

"Conceding that Bessler had a right in the Frigidaire in question in the nature of a property right, yet nevertheless it was not the entire property in

> the *res*, and was not, we think, the sort of property right susceptible of seizure, or sale in the manner provided by Section 6775. In other words the Frigidaire in question was not, under the circumstances herein appearing, 'personal property of' Bessler within the meaning of'' the statute.

The situation presented in the case just discussed is analogous to that involved in the instant case. The applicability of the decision there, to the instant case, appears to be open to little argument.

The inferences to be drawn from Judge Campbell's opinion are that the bankrupt had only a special property in those chattels covered by the conditional sales contracts and that the title to such chattels remain in the conditional vendor. The effect of this decision was to declare that the interest retained under the contract by the conditional vendor may not be attached, levied upon, or otherwise applied to the payment of personal property taxes which may be owing by the conditional vendee.

This being true, the converse is that no tax may be levied as against the conditional vendee on any property right other than that which he presently has, and that such other interests, or further rights in the chattels as may repose in other parties, are not available to the taxing authority in the assessment of a personal property tax upon a conditional vendee.

Professor George Gleason Bogert, draftsman of the Uniform Conditional Sales Act, in his Commentaries on Conditional Sales (cited in *General Motors*, vs. *Whitfield*, *supra*,) Vol. 2A (1924), page 37, Section 28, makes the following statement:

> "The Buyer's interest, when he is in possession, has been recognized as a proper subject of taxation, and by way of dictum the seller's property rights have also been called taxable. Singer Sewing Mach. Co. *v.* Cooper, (1920) 263 Fed. 994. This seems sound. The property in the goods may well be divided into two parts, the general property in the seller equal in value to the balance due on the price, and the special property in the buyer, to be valued at the worth of the goods, less the amount due to the conditional seller on the price. In Tuthill *v.* Wheeler, (1849) 6 Barb. (N. Y.) 362, goods were taxed as the seller's although in the buyer's possession; but the court seems to have treated the case as a mere contract to sell and not as a true conditional sale."

On the basis of the foregoing reasoning, it appears that at best the extent of the tax imposed upon the estate should have been calculated and fixed on the basis of the amount that Spier Aircraft Corporation paid on account of the contract price. This is all the more so, because in the instant case no question exists, nor was any raised as to the existence or validity of the conditional sales contracts and the balances due thereon, as found by the Court below. We contend that the personal property encumbered should be evaluated as to the extent of the bankrupt's interest, and taxes paid on the basis of such evaluation.

This is particularly true in view of the provisions of Section 64a of the Bankruptcy Act, which provide that:

> "The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt."

See

In re Wells, (D. C. Md.) 23 A. B. R. (N. S.) 615, 4 Fed. Supp. 329.

POINT II.

The increased tax claim was a result of caprice, hearsay, without notice or hearing, and has no legal foundation.

The admitted facts show that the supplemental claim of the City of Jersey City was filed on September 8, 1943. It was not until then that the Bankruptcy Court or the trustee in bankruptcy were judicially charged with notice that any such claim was being asserted against the bankrupt estate. *Lambertville Rubber Co. Inc.* 111 Fed. (2d) 45, 42 A. B. R. (ns) 697. The bankruptcy statute regulates the manner in which claims may be asserted against a bankrupt estate, and until such claims are asserted in the manner provided for by law, the Bankruptcy Court is not charged with notice of the existence of such claims, and need not treat them in any distribution. It is equally plain from the record that the time to appeal from the re-valuation as fixed by the Hudson County Board of Taxation, without notice to petitioner, expired on August 15, 1943. It is admitted that no notice was given to the trustee or Referee in Bankruptcy of the assertion or existence of an increased claim based upon a re-valuation prior to September 8, 1943. Consequently, the increased valuation, having been imposed without notice, and asserted after the time to appeal from such increased assessment expired, is devoid of any legal quality. The plain import of the language of this Court in *Arkansas* v. *Thompson,* 313 U. S. 132, 61 Sup. Ct. 888, 85 L. Ed. 1244, is that a taxpayer in bankruptcy or reorganization is entitled to have at least

one separate trial on the question of the property taxed. Mr. Justice Black, speaking for the Supreme Court in the case, said, at page 143, in referring to *N. J.* v. *Anderson*, 203 U. S. 483, 51 L. Ed. 284, 27 Sup. Ct. 137:

> "But be that as it may, Sec. 64(a) specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding."

This Court in *Township of Hillsborough* v. *Doris Duke Cromwell*, decided January 28, 1946, Vol. 90—No. 7, Sup. Ct. L. Ed. Ad. Sh. 298, said, at p. 302, said in respect to the methods prevailing in the State of New Jersey for a review of tax assessments:

> "In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative (Wallace *v.* Hines, 253 U. S. 66, 68, 64 L. ed. 782, 785, 40 S. Ct. 435) whether the State affords full protection to the federal rights."

Singularly, in the case cited the taxpayer's opportunity to appeal to the State Board of Tax Appeals had expired even before the Court below ruled on the motion to dismiss, for as Mr. Justice Douglas said, at page 303 to 304:

> "In the present case it appears that respondent's opportunity to appeal to the State Board of Tax Appeals had expired even before the District Court ruled on the motion to dismiss. And it is not

clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds."

Almost the same situation existed in the case at bar.

Conclusion.

Petitioner contends that there is manifest injustice in the determination by the Court below for the reasons following:

A. Regardless of the amount of the final award to the trustee in the litigation against the Government, the creditors of the bankrupt are entitled to the benefit of a reduction of the tax assessment to the extent of the admitted liens against the property, amounting to $82,041.72, for, otherwise, the creditors of the bankrupt estate would be paying taxes upon property which did not belong to the bankrupt but in which it had only a partial interest.

B. Should the litigation pending in the United States Court of Claims ultimately result in a determination that the trustee is entitled to recover the amount offered by the Government, to wit, $133,850.56, then the amount of the supplemental claim which was predicated upon an alleged valuation of $165,000.00 would be obviously excessive. In addition there is no proof as to the items which made up the property for which $165,000 was bid, and in the absence of such proof, the taxpayer is unable to safeguard his constitutional rights.

C. The method of re-valuation was arbitrary and capricious, without trial or hearing afforded to the trustee,

and, consequently, violative of petitioner's constitutional rights of protection against deprivation of property without due process of law.

It is respectfully submitted, therefore, that in order that the errors herein pointed out may be corrected and justice done, and the law properly and authoritatively defined, the judgment of the United States Circuit Court of Appeals for the Third Circuit be reviewed and reversed, and that to such end a writ of certiorari be granted.

MAX L. ROSENSTEIN,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER

of

SPIER AIRCRAFT CORPORATION,
Bankrupt,

SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Appellant.

MEMORANDUM IN OPPOSITION TO WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

Summary Statement of Matter Involved..... 1

Reasons Why Writ Should Not Be Allowed..... 6

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI:

I. Opinion Below..... 9

II. Jurisdiction 9

III. Statement of the Case..... 10

Appendix B—Questions Presented..... 10

Point I. Over-assessment of Petitioner's property constitutes no deprivation of any right under the Federal Constitution 12

Point II. It is not the function of the equal protection clause of the Fourteenth Amendment to uproot systems of taxation inseparable from the states' tradition of fiscal administration and ingrained in the habits of its people..... 14

Point III. When a case comes up on appeal after concurrent findings by the Referee in Bankruptcy and the District Judge, such findings of fact will not be set aside on anything less than a demonstration of plain mistake 20

Point IV. Tangible personal property, actually located in the taxing district of Jersey City, legal title to which is in the bankrupt, is taxable by said authority according to its true value, regardless of chattel mortgages or conditional sales, or theoretical division of interest in the property..... 23

CONCLUSION 26

Cases Cited.

PAGE

Becker vs. *Little Ferry Borough*, 125 N. J. L. 141.... 23

Brown vs. *New Jersey*, 20 S. Ct. 77..... 7

Carino vs. *Insular Government*, 212 U. S. 449, 459, 29 S. Ct. 334 14

George A. Fuller Co. vs. *City of Jersey City*, 21 Misc. 38 18

Hallinger vs. *Davis*, 13 S. Ct. 105..... 7, 9

Knox vs. *O'Shea*, 4 N. J. Misc. 272.....17, 18

Middletown Township vs. *Ivins*, 102 N. J. L. 36..... 16

Nashville & St. L. Ry. vs. *Browning*, 310 U. S. 362, 370, 371 .....7, 12, 13, 14

Ohio Valley Bank vs. *Mack*, 163 Fed. 155, 158; 24 L. R. A. (N. S.) 184..... 20

Paulison vs. *Taylor*, 35 N. J. L. 184..... 17

State vs. *Black*, 5 N. J. Misc. 48..... 7

New Jersey Statutes.

PAGE

N. J. S. A. 54:4-15 ..... 5, 23

N. J. S. A. 54:4-64 ..... 14, 17

N. J. S. A. 54:4-35 15

N. J. S. A. 54:4-46 15

N. J. S. A. 54:4-55 17

N. J. S. A. 54:3-21 18

N. J. S. A. 54:3-22 19

Other Authorities.

Remington on Bankruptcy, Vol. 8, p. 123, sec. 3796.. 20

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IN THE MATTER
of
SPIER AIRCRAFT CORPORATION,
Bankrupt,

SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Summary Statement of Matter Involved.

1. This appeal attempts to challenge the action by the United States Circuit Court of Appeals for the Third Circuit in affirming the judgment of the United States District Court for the District of New Jersey, in upholding the claim filed by the City of Jersey City against the estate of the Spier Aircraft Corporation, bankrupt, for personal property taxes in the sum of $11,803.04.

2. Spier Aircraft Corporation, a New York corporation, was engaged in business at 200 Central Avenue, Jersey City, New Jersey. Proceedings in involuntary bankruptcy were commenced on said corporation on January 22, 1943. On February 9, 1943, an order of adjudication in bankruptcy was entered.

3. On or about February 10, 1943, the Collector of taxes for the City of Jersey City filed a claim with the Honorable John Grimshaw, Jr., Referee in Bankruptcy, claiming unpaid personal taxes against the bankrupt estate in the sum of $3,024.96. Part of said claim was for the year 1943, in the sum of $1,611.90, together with 80 cents interest, making a total of $1,612.70 for said year 1943. This was on the basis of a valuation of $30,000, at a rate of $53.73 per thousand, and upon which the tax had been computed in the sum of $1,611.90.

4. The Collector of taxes for the taxing district of Jersey City, in conformity with N. J. S. A. 54:4-35, had started to make up his assessments upon real and personal property on or about October 1, 1942, and had completed the work by January 10, 1943, on which date he attended before the County Board of Taxation and filed with said Board his complete assessment list and a true copy thereof, which is called the Assessor's Duplicate, properly made up and legibly written in ink to be examined, revised and corrected by the County Board of Taxation.

5. In accordance with N. J. S. A. 54:4-46 (this section will be set forth in full below), said County Board of Taxation met, for the purpose of examining, revising and correcting the tax list and duplicate of the various taxing districts in the County, including the taxing district of Jersey City. Among the properties revised was the personal property of the Spier Aircraft Corporation. The said Board increased the assessed valuation from $30,000 to $165,000.

6. The taxing district of Jersey City, when it was notified by the County Board of Taxation of such changes, caused its assessor to enter in appropriate column upon the tax list and duplicate the corrected value assessed to each person for both real and personal property. Among these was the revised and corrected revaluation of the Spier Aircraft Corporation assessment.

7. The assessor, in conformity with N. J. S. A. 54:4-64 (it will be enumerated in full below), during the period between July 29, 1943, and July 31, 1943, mailed the tax bill to the Spier Aircraft Corporation, as shown by the following incident.

8. On September 28, 1943, Charles Schmidt, employee of the Assessor's Office of Jersey City, appeared before the Referee, in response to a subpœna to bring the records of the Assessor's and Collector's Offices, so that Max Rosenberg, counsel to the trustee, Samuel Coombs, could ascertain how the assessment was so increased. After examining Schmidt, on the stand under authority of the Bankruptcy Act, Mr. Rosenberg was not satisfied with Schmidt's knowledge of the situation. The Referee who was presiding suggested that Rosenberg, Schmidt and Edward M. Malone, counsel for the City of Jersey City, should go and visit the Assessor's Office to examine the duplicate copy of the tax list as revised by the County Board.

9. While at the Municipal Building, Rosenberg, Malone and Schmidt also examined the records of the Collector's Office. These records disclosed that all tax bills had been posted in the United States mail to property owners during the three-day period between July 29, 1942, and July 31, 1943. The records further disclosed that the tax bill of the Spier Aircraft Corporation, showing the increased valuation, had been posted and directed to the Aircraft Company during this same period. Therefore, in the ordinary course of delivery the tax bill had to be delivered to the Aircraft Corporation by August 1, 1943. It was never returned to the taxing district of Jersey City and counsel for the trustee does not so contend.

10. Petitioner, in paragraph 3, page 2, of his petition, argues that by the time the amended proof of claim was filed by the Collector of the City of Jersey City, the time for appeal from the increased assessment by the Hudson County Board of Taxation had expired. However, N. J. S. A. 54:4-64, among other things, provides that the validity of any tax or assessment, or the time at which it shall be payable, shall not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes or assessments against him or his property. N. J. S. A. 54:3-21 (enumerated below), prescribes that by August 15th all taxpayers feeling aggrieved by the action of the County Board of Taxation, sitting as an administrative body in revising the values put on property in the first instance by the taxing districts, may file a petition of appeal to this same county board of Taxation (see N. J. S. A. 54:3-22 enumerated below) which then sits as a judicial body, has open hearings at which appear witnesses, under oath, both sides are represented by counsel and this body may then change, revise and correct the assessment put on by itself, in its revision, in accordance with the true value of the taxable property.

11. This taxpayer, by that time a bankrupt, did not choose to take advantage of the relief under the New Jersey statutes, but neglecting to do so, now endeavors to invoke the aid of the United States Supreme Court by claiming that he had been deprived of his constitutional right of appeal.

12. The City Collector, subsequent to this, in conformity with the Bankruptcy Act, on September 7, 1943, filed a formal Supplemental Proof of Claim with the Referee showing a valuation on the personal property of $165,000. upon which taxes were due in the sum of $11,805.05, instead of and in place of the original claim of taxes in the sum of $3,024.96.

13. As to the encumbered personal property located upon the bankrupt's premises in the taxing district of Jersey City, as it was noted above that N. J. S. A. 54:4-64, provides that the validity of any tax or assessment shall not be affected by the failure of the taxpayer to receive his tax bill. This taxpayer could have had relief as to his interest in the personal property by appealing to the County Board of Taxation and under N. J. S. A. 54:4-14 (see enumerated below), said Board could determine that a deduction of all debts due and owing from such persons to creditors residing in the State, could be made. But in the absence of the prerequisite of a claim for reduction, the taxing authority would have no knowledge of any other interest than that of the owner. However, if there had been such an appeal, the County Board could not allow the deduction because N. J. S. A. 54:4-15 provides:

> "No deduction for debt shall be allowed from the assessed value of tangible goods and chattels in which the value inheres in and is supported by the thing or article itself."

14. There is another important point in the history of this case; besides the fact the bankrupt taxpayer did not take advantage of the relief given him by the State statutes by appealing to the County Board of Taxation, and then if dissatisfied, could appeal to the State Board of Taxation, and if dissatisfied there could apply to the State Supreme Court for a Writ of Certiorari; and that is that the Referee in Bankruptcy found as a fact that the mortgages and conditional sales mentioned in the petitioner's brief, were held by non-resident corporations, and that the assessment made by the Hudson County Board of Taxation could not be decreased by the amount of these liens, as contended by the Trustee-Appellant (Tr. 67, Appendix 6A).

Reasons Why Writ Should Not be Allowed.

1. There is no question of constitutional law arising out of the determination in the courts below. There is no reason why consideration and determination of the questions raised by the appellant should be considered.

2. The determination by the court below was not in disregard of the rights of petitioner as trustee in bankruptcy, and of the rights of general creditors of the Spier Aircraft Corporation, because relief was provided by the New Jersey statutes, and by certiorari if the taxpayer-trustee had taken advantage of same. The Referee in Bankruptcy found as a fact that the encumbered personal property was taxable under the New Jersey statutes.

3. The contention that the incumbered personal property should be taxable only to the extent of the special property existing in favor of the bankrupt, is without authority, and unfounded in the law, because the statute provides that no deduction or debt shall be allowed from the assessed value of tangible goods and chattels in which the value inheres in and is supported by the thing or article itself.

4. The raising of the question whether or not legal title, or equitable title, or interest of some of the parties in the tangible personal property is not well taken, because the statute does not leave the assessor in so precarious a position with regard to his tax collection as might be involved in the unraveling of the snarled relations between conditional vendors, chattel mortgages, with recorded or unrecorded assignment of interest and so on, and the government's right to collect tax levies may not be thwarted or complicated by a theoretical division of that which has long been regarded by our jurisprudence as one chattel in which the value inheres and is supported by the thing or article itself.

5. In sustaining the controverted claim, the Court below in approving the methods of taxing authorities, in effect, a so-called "over assessment," followed the ruling in the case of *Nashville & St. L. Ry.* vs. *Browning,* 310 U. S. 362 at page 370.

6. The increased assessment was not the result of arbitrary and capricious acts on the part of the taxing authority, nor was it the product of hearsay, because the record shows that the taxing authorities did investigate before arriving at its value. It will later be shown that the trustee-taxpayer did not take advantage of the right of appeal at the date he could have done so. The statute provides for relief with trial, hearing, afforded to both parties, witnesses and cross examination. The trustee-taxpayer did not take advantage of this statute.

7. The Fifth Amendment to the United States Constitution cannot be invoked because this amendment is a limitation on the power of Congress and is not a limitation on the powers of the States (*Brown* vs. *New Jersey,* 20 S. Ct. 77; *Hallinger* vs. *Davis,* 13 S. Ct. 105; *State* vs. *Black,* 5 N. J. Misc. 48). The challenge in this case is against the remedy provided in the New Jersey statutes.

8. Respondent in the interest of brevity (Rule 38, Paragraph 2) restricts further argument on these points, but respectfully refers to and incorporates by reference thereto of all the matters presented to the United States Circuit Court of Appeals for the Third Circuit, in the transcript of the record on appeal, with the same variance and effect, as if herein set out at length.

WHEREFORE, respondent prays that the Writ of Certiorari will be denied, and that the decree of the United States Circuit Court of Appeals for the Third Circuit, be affirmed by this Honorable Court.

CHARLES A. ROONEY,
Counsel, City of Jersey City,
New Jersey.

Supreme Court of the United States

OCTOBER TERM, 1946. No.

IN THE MATTER
of
SPIER AIRCRAFT CORPORATION,
Bankrupt,
SAMUEL M. COOMBS, JR., Trustee in Bankruptcy of Spier Aircraft Corporation, Bankrupt,
Petitioner.

Brief in Opposition of Petition for Writ of Certiorari.

I.

Opinion Below.

The United States Circuit Court of Appeals for the Third Circuit rendered a *per curiam* opinion on May 1, 1946, and is reported in Fed. (2d) .

II.

Jurisdiction.

This Court should not take jurisdiction because the Fifth Amendment to the United States Constitution is a limitation on Congress, and not on the State of New Jersey. *Hallinger* vs. *Davis, supra.*

III.

Statement of the Case.

The essential facts are fully set forth in the accompanying summary statement of the matter involved and in the interest of brevity are not further elaborated upon. The points involved will be discussed in the argument to follow.

APPENDIX "B."

Questions Presented

1. When the laws of the sovereign state have been complied with by the taxing authority, can a tax claim filed in conformity with such law, be held to be invalid?

2. When the laws of the sovereign state have been complied with by the taxing authority, can a tax claim filed in conformity with the Bankruptcy Act, be held to be invalid?

3. Will the United States Supreme Court disturb the findings of fact by the Referee in Bankruptcy, which has been concurred in by the United States District Court of New Jersey, and by the United States Circuit Court of Appeals, for the Third Circuit?

4. Can tangible personal property, actually located in the taxing district of Jersey City, New Jersey, title to which is in the bankrupt, be held to be taxable only to the extent of the bankrupt's interest to the exclusion of chattel mortgages and condition contracts of sale, leaving the taxing district in so precarious a position in its tax collection as is involved in the unraveling of the snarled relations between those in interest, such as recorded and unrecorded assignments, options to buy, and so on, so that the district's

right to collect taxes would be thwarted by a theoretical division of that which has been regarded as taxable personal property in New Jersey's jurisprudence?

POINT I.

Over-assessment of Petitioner's property constitutes no deprivation of any right under the Federal Constitution.

This conclusion was reached in *Nashville C. & St. Ry.* vs. *Browning,* 310 U. S. 362, at the bottom of page 370 to 371. Suit had been brought by the Nashville, Chattanooga & St. Louis Railway against Gorden Browning and others, constituting the State Board of Equalization of Tennessee, to set aside an assessment of plaintiff's property, tangible and intangible, under Tennessee's *ad valorem* tax law. A judgment of dismissal was affirmed by the Supreme Court of Tennessee and plaintiff brought certiorari to the United States Supreme Court. The later Court affirmed the judgment of the state court.

Mr. Justice Frankfurter delivering the opinion of the Court, states on page 370:

> "Thorough canvass by the state courts found no justification for upsetting the determination of the Commission, and we could scarcely find warrant in the record for doing so. *But even assuming that there was an over-assessment, constitutional invalidity would not follow.* If the needs of a state require higher taxes, the Fourteenth Amendment certainly does not bar their imposition. The maintenance of higher assessment in the face of declining value is merely another way of achieving the same result."

Counsel for the Trustee, in his petition, calls the increase in the tax, a "re-valuation," but in his conclusion (paragraph "B," page 22), he states:

> "Should the litigation pending in the United States Court of Claims ultimately result in a determination that the trustee is entitled to recover the amount offered

> by the government, to wit, $133,850.56, then the amount of the supplemental claim which was predicated upon an alleged valuation of $165,000 would be obviously excessive. In addition, there is no proof as to the items which made up the property for which $165,000 was bid, and in the absence of such proof, the taxpayer is unable to safeguard his constitutional rights."

This, we submit, is an argument that the valuation of $165,000 is an over-assessment and, therefore, unconstitutional. Thus, it falls squarely within *Nashville C. & St. Ry.* v. *Browning, supra,* and this Court will not entertain such an appeal.

POINT II.

It is not the function of the equal protection clause of the Fourteenth Amendment to uproot systems of taxation inseparable from the states' tradition of fiscal administration and ingrained in the habits of its people.

Again we quote *Nashville C. & St. L. Ry.* v. *Browning, supra.* The Court says on page 369 of Vol. 310, U. S. Reports:

> "Deeply embedded traditional ways of carrying out state policy, such as these of which the petitioners complain, are often tougher and true law than the mere dead words of the written text."

Compare *Carino* v. *Insular Government,* 212 U. S. 449, 459, 29 S. Ct. 334.

Not only does the Trustee for the bankrupt herein fail to show facts sufficient to sustain his argument, but in his petition and memorandum merely states, that by the time the proof of claim was filed by the Collector of the City of Jersey City, it was too late to appeal under the New Jersey statute.

However, N. J. S. A. 54:4-64 provides as follows:

> "54:4-64. Delivery of Tax bills.
>
> "As soon as the tax duplicate is delivered to the taxing district, as provided in section 54:4-55 of this title, he shall at once begin the work of preparing, completing, mailing or otherwise delivering tax bills to the individuals assessed, and shall complete that work at least two months before the third installment of taxes falls due. He shall also, at least two months before the first installment of taxes for the year falls due, prepare and mail, or otherwise deliver to the individuals assessed, a tax bill for such following first and second installments, computed as hereinafter provided at one-

half of the complete tax last previously levied. The validity of any tax or assessment, or the time at which it shall be payable, shall not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes or assessments against him or his property."

The Collector, as recited in the facts, did send the tax bill according to law and even in the event that the bankrupt did not receive the tax bill, which is not true, under this statute it was incumbent upon him to investigate and discover how much taxes were due. Rosenblum, on cross-examination, stated the bankrupt "had from April 1 to August 15 within which to file an appeal." (Appendix, p. 3a, bottom, Trustee-Appellant's brief.) (Before U. S. Circuit Court, 3rd Circuit.)

The tax is to be tested by the law of the sovereignty. The statutes of New Jersey further provide:

"54:4-35. Period for assessing; assessor's duplicate.

"The assessor shall begin the work of making assessments upon real and personal property on October first in each year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided."

"54:4-46. Tax lists and duplicates revised by county board.

"Upon the filing of the assessment lists and duplicates by the assessors with the county board of taxation, the board shall meet for the purpose of examining, revising and correcting the tax lists and duplicates. Any assessor shall attend before the board at such time and place as it may direct, and shall, under the direction

and supervision of the board, make up and prepare corrected tax lists and duplicates."

In interpreting this section the New Jersey Supreme Court in the case of *Middletown Township* vs. *Ivins,* 102 N. J. L. 36, that:

> "Under P. L. 1906, p. 211, Sec. incorporated in title 54:3-13 relating to duty of county boards of taxation, and provisions of this section, in proceeding by the county board of taxation to increase assessed value of properties in various taxing districts of county, it was immaterial how or from what source county board obtained information that property was not being assessed at true value, and fact that information came partly from State Board of Taxes and Assessment did not affect legality of proceedings."
>
> Title 54:3-13 provides:
> "Each county board of taxation shall secure the taxation of all property in the county at its true value, in order that all property * * * shall bear its full, equal and just share of taxes."

The same case, *Middletown Township* vs. *Ivins,* further holds:

> "Increase of assessed value of property by County Board of Taxation would be deemed to have been made after investigation on showing that members of the Board were familiar with value of property and made general inspection and investigation."
>
> 54:4-47. Revision and equalization; functions of county board.
> "The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked, at its true value,

and in general do everything necessary for the taxation of all property in the county equally and at its true value."

The courts have held in *Paulison* vs. *Taylor,* 35 N. J. L. 184, that:

"Every intendment would be made as to the legality of the proceedings of the board of assessors in reviewing the assessments for the purpose of equalizing them."

54:4-55. Corrected duplicates returned to taxing districts; lists remain of record.

"The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes, assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record."

In interpreting this section the courts have held that:

"No notice is required to taxing districts or to individual property owners of proceedings by county board of taxation, under 54:4-46 to 54:4-48 to increase assessed value of properties in various taxing districts or county."

Middletown vs. *Ivins, supra.*

"Collector was under duty to send bill for taxes."

Knox vs. *O'Shea,* 4 N. J. Misc. 272.

54:4-64. Delivery of tax bills.

"As soon as the tax duplicate is delivered to the collector of the taxing district, as provided in section 54:4-55 of this title, he shall at once begin the work of preparing, completing, mailing or otherwise delivering tax bills to the individuals assessed, and shall complete that work at least two months before the third installment of taxes falls due. He shall also, at least two months before the first installment of taxes for the year falls due, prepare and mail, or otherwise deliver to the

individuals assessed, a tax bill for such following first and second installments, computed as hereinafter provided, at one-half of the complete tax last previously levied. *The validity of any tax or assessment, or the time at which it shall be payable, shall not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes or assessments against him or his property.*"

The courts have held in New Jersey that:

"Local taxes are due and payable in four installments—on the first day of February, May, August and November in each year."

George A. Fuller Co. vs. *City of Jersey City,* 21 Misc. 38.

"Collector was under a duty to send bill for taxes and accept and receipt for those tendered."

Knox vs. *O'Shea,* 4 N. J. Misc. 272.

This taxpayer did not safeguard his rights by using the method in the New Jersey statutes.

54:3-21. Appeals by taxpayers; by taxing districts; petition.

"A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the *assessed valuation of property in the taxing district,* or by the assessed valuation of property in another taxing district in the county, may on or before August fifteenth appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent,

and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal."

54:3-22. Hearing of appeals; witnesses.

"The board shall thereupon make such order respecting the time and manner for hearing the appeal as it may deem just, and shall summarily hear and determine the appeal, and revise and correct the assessment in accordance with the true value of the taxable property. It may compel the attendance of witnesses, the production of books and papers before it, examine witnesses or cause witnesses to be examined under oath before it, which oath may be administered by a member of the board."

POINT III.

When a case comes up on appeal after concurrent findings by the Referee in Bankruptcy and the District Judge, such findings of fact will not be set aside on anything less than a demonstration of plain mistake.

The above proposition is laid down in the case of *Ohio Valley Bank* vs. *Mack*, 163 Fed. 155, at 158; 24 L. R. A. (NS) 184.

Assuming, for the sake of argument, the Referee in Bankruptcy had power to review the assessment in the first instance (and Trustee-Appellant contends he did), his conclusion that the valuation of $165,000 placed on the personal property of the bankrupt by the Hudson County Tax Board, was a finding of fact.

In the opinion filed by District Court Judge Meaney, he concluded as follows:

> *"Having properly determined that it was within his power to review under the circumstances, the Referee concluded that the assessment and valuation was properly arrived at, and allowed the supplemental proof of claim in full.*
>
> *"After a careful examination of the Referee's report and the memorandum filed by the trustee, and after a thorough perusal of the testimony and briefs previously submitted, it is my determination that the Referee's conclusions were proper and should be affirmed in all respects."* (Appendix p. 9a, Trustee-Appellant's brief. Before U. S. Circuit Court.)

Remington on Bankruptcy, holds in Section 3796, page 123, Volume 8:

> "A referee's findings are presumptively correct when a judge refuses to accept the finding of a referee, and an appeal is taken, it is the finding of the judge that is

presumptively correct, not that of the referee. (Citing cases.)

"There is a presumption of verity that the judge had evidence or admissions to justify him in rejecting the referee's findings. (Citing cases.)

"Some courts say that when the judge rejects the referee's findings, the appellate court has the same power over the judge's findings that the judge had over the referee's findings. (Citing cases.)

"The seventh circuit holds that when a judge and referee conflict, they do not try the case de novo on the record, but determine whether or not the judge exceeded the power to review conferred on him. (Citing cases.)

"This position was reaffirmed by the same court in a later case. (Citing cases.)

"*It is only when the case comes up on concurrent findings that the findings will not be set aside except for plain mistake.*" *Kowalsky* v. *American Employers Ins. Co.*, 90 F. (2d) 476, 34 A. B. R. (NS) 280.

As shown above in Judge Meaney's opinion, the said judge reviewed everything that was before the referee.

The referee in his memorandum, not only upholds the valuation of the personal property put on by the Hudson County Board, but also shows why he did it, in the following language:

"*In my opinion, the valuation of $165,000 placed on the personal property of the bankrupt by the Hudson County Board must be accepted unless the record shows proof sufficient to warrant a rejection of that valuation. I do not find in the record, proof sufficient to show that the valuation is erroneous. All the personal property of the bankrupt was requisitioned by the Navy Department with the exception of certain personal property which was later sold for $3,628.45. The Navy preliminarily determined the value of the property which it requisitioned at $133,650.56, but the trustee was not satisfied with this valuation and has*

obtained permission to reject the proposal of the Secretary of the Navy to pay this sum and has been authorized to institute suit in the Court of Claims for such sum as he deems fair and just compensation. This is the only other proof with respect to the value of the personal property upon which the taxes for 1943 were assessed, and it is not sufficient to show that the value of the property may not well have been $165,000.''

The brief in behalf of the trustee-appellant is barren of any allegation or demonstration of mistake.

POINT IV.

Tangible personal property, actually located in the taxing district of Jersey City, legal title to which is in the bankrupt, is taxable by said authority according to its true value, regardless of chattel mortgages or conditional sales, or theoretical division of interest in the property.

54:4-15. When deductions not to be made or allowed; mortgages; when taxable.

"No deduction for debt shall be allowed from the assessed value of tangible goods and chattels in which the value inheres in and is supported by the thing or article itself. No allowance or deduction shall be made for personal property or securities claimed to be exempt from taxation, unless a sworn claim therefor shall be made, setting forth a detailed list of the securities and personal property claimed to be exempt, the dates when they were purchased, and that they were not purchased with intent to escape taxation. No mortgage on personal property, or on both personal and real property, or the debts secured by the mortgage, shall be assessed for taxation unless a deduction therefor shall have been claimed by the owner of the mortgaged property and allowed by the assessor. The governing body of a taxing district may regulate and fix the time within which statements of taxable property shall be made and delivered to the assessors."

The statutes of New Jersey do not put a duty on the taxing district to investigate every piece of tangible personal property in the district to determine whether there is any outstanding interest other than that of the owner of title. Where such a situation exists, the statute requires that the taxpayer make application for such exemption to the taxing district.

The language used in the *Becker* vs. *Little Ferry Borough,*

125 N. J. L. 141, while it applies to land, is very significant in overcoming my opponent's contention before your Honorable Court.

> "While a landlord and tenant, by their contract or dealings, may affect such a division of tax liability as between themselves as to cause buildings or improvements upon the lands to take on the aspect of chattels, real or even mere chattels, a municipality may not be left in so precarious a position with regard to its tax collections as is involved in the unraveling of the snarled relations between the landowner and the succession of tenants in the instant case, with recorded and unrecorded leases, options, provisional permits, assignments of interest, and so on, and the government's right to collect tax levies may not be thwarted or complicated by a theoretical division of that which has long been regarded by our jurisprudence as reality into subdivisions with ill-defined limits and vague attributes."

In the case at bar, however, the referee has found as a fact that the mortgages and conditional sales mentioned in the Trustee-Appellant's brief below, were held by non-resident corporations, and that the assessment made by the Hudson County Tax Board could not be decreased by the amount of these liens, as contended by the Trustee-Appellant.

The answer to this contention is contained in the memorandum filed by the referee as follows (Appendix, p. 6a, Trustee-Appellant's brief):

> "There are several reasons why this decree cannot be made. *First*: Under New Jersey Revised Statutes, Section 54:4-14 the valuation of personal property cannot be reduced by amounts owing to creditors who do not reside in the State of New Jersey. Neither the Modern Industrial Bank nor the Commercial Investment Trust, Inc., is a resident of this state. The proofs do not show where William Meyerhoff resides and without such proof, his claim also cannot be deducted.

Second: The personal property on which the tax was assessed was (Page 68) tangible personal property. Section 54:4-15 of the Revised Statutes provides that such a deduction cannot be made from the assessed value of tangible personal property. *Third*: Proper steps were not taken to obtain the deduction. *In re*: *A. V. Manning Sons,* 16 Fed. Supp. 932; *In re*: *Wilsonite Corporation,* 28 Fed. Supp. 913.

"The trustee's attorney relies also for such deduction on Section 64a(4) of the Bankruptcy Act, but this section provides 'No order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court.' Obviously, the payment of the full tax claimed by Jersey City will not exhaust the value of the bankrupt estate's interest in the property on which the taxes were assessed. The value of the property on which the tax was assessed is substantially in excess of the amount due on the conditional sales contracts and the chattel mortgage and the tax claimed by the City of Jersey City."

The record does not show that any application was ever made by the bankrupt for any exemptions which he might have had because of outstanding interest through conditional sales agreements or chattel mortgages. The tangible personal property of the bankrupt is, therefore, taxable in full.

Conclusion.

Respondent contends that there is no manifest injustice in the determination by the Court below for the following reasons:

(a) It does not follow that the determination of the Court below required the trustee to pay a tax upon property which did not belong to the bankrupt, thus depriving the bankrupt's creditors of money belonging to them. If a tangible chattel is assessed at a certain value and is owned by more than one party, the creditors of one owner cannot complain because the person against whom they have a lien had to pay the whole tax. Their remedy is against the other owners of interest.

(b) The challenge of the correctness of the decision by the United States Circuit Court of Appeals for the Third Circuit, which affirmed an order of the United States District Court for the District of New Jersey, upholding the increased assessment from $30,000.00 to a valuation of $165,000, demonstrates that this appeal is an attempt to correct an asserted "over-assessment." This Court will not entertain such an appeal.

(c) The laws of New Jersey, as enumerated above, have been complied with. The Hudson County Board of Taxation revised and corrected the valuation of the property herein. The Collector of the taxing district corrected his duplicate to conform, in accordance with the statute above recited. With the raised assessment it was mandatory on the collector to increase the tax bill. He thus increased it, mailed to the Spier Aircraft Corporation, on or before July 31, 1943, and served the Referee in Bankruptcy with the formal amended Proof of Claim on September 7, 1943. The trustee-taxpayer stood in the same position as any

other taxpayer and could have appealed to the Hudson County Board of Taxation between July 31, 1943, and August 15, 1943. It neglected to do so. The taxing district not alone conforming to the state laws but conforming to the bankruptcy laws, then filed the amended claim on September 7, 1943.

(d) The method used of arriving at a higher value was not violative of the petitioner's constitutional rights of protection against deprivation of property without due process of law, under the Fifth Amendment. This amendment is a limitation on the Congress of the United States and not on the states.

It is respectfully submitted, therefore, that the judgment of the United States Circuit Court of Appeals, for the Third Circuit, be affirmed and that the application for a Writ of Certiorari be denied.

Respectfully submitted,
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Counsel for Respondent,
City of Jersey City, New Jersey.